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95-1714

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

BRYAN NIEWALD,
Petitioner

v.

MYRON SCAFE, CHIEF OF POLICE,
CITY OF OVERLAND PARK POLICE DEPARTMENT

On Petition For Writ of Certiorari
To The Supreme Court of the State of Kansas

PETITION FOR WRIT OF CERTIORARI

BRYAN NIEWALD
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QUESTION PRESENTED

Did the Kansas State courts err by failing to declare the defendant's enforcement of 18 U.S.C. § 922(s), the so-called "Brady Act," unconstitutional as violative of the plaintiff's fundamental right to keep and bear arms under the Ninth and Tenth Amendments to the United States Constitution?

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The petitioner, Bryan Niewald, respectfully petitions for a writ of certiorari to review the order of the Supreme Court of the State of Kansas, which denied review of the Kansas Court of Appeals' opinion affirming the dismissal of this action by the District Court of Johnson County, Kansas.

OPINIONS AND ORDERS ENTERED

The Memorandum Opinion and Decision of the District Court, slip opinion 94C11593, was filed January 18, 1995, dismissing plaintiff's petition on the merits, and is reprinted here at Pet. App. 1a. The Memorandum Opinion of the Kansas Court of Appeals, slip opinion 95-73337-A, not designated for publication, was filed December 1, 1995, affirming the dismissal, and is reprinted here at Pet. App. 9a. The Order of the Kansas Supreme Court in case number 95-73337-AS was entered February 7, 1996, denying review, and is reprinted here at Pet. App. 16a.

JURISDICTION

The Kansas Supreme Court entered its order denying appellant's Petition for Review on February 7, 1996 (Pet. App. 16a). This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

RULE 29.4(b) STATEMENT

Whereas 28 U.S.C. § 2403(a) may apply, petitioner has complied with Rule 29.4(b) notifications.

CONSTITUTIONAL PROVISIONS

"The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people." United States Constitution Amendment Nine.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." United States Constitution Amendment Ten.

"This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people." Kansas Constitution Bill of Rights § 20.

PERTINENT STATUTORY PROVISIONS

The challenged statutory provisions are located at 18 U.S.C. § 922(s) *et seq.*, reprinted here at Pet. App. 23a.

STATEMENT OF THE CASE

I. Introduction

On October 7, 1994, petitioner filed an action in the District Court of Johnson County, Kansas, seeking a declaratory judgment that the so-called "Brady Act," codified at 18 U.S.C. § 922(s), is unconstitutional and void as enforced by defendant Chief of Police Myron Scafe against plaintiff Bryan Niewald.

The District Court rendered a final judgment sustaining the defendant's motion to dismiss, finding a lack of standing on the grounds relating to the Ninth and Tenth Amendments. On appeal, the Kansas Court of

Appeals affirmed, indicating both a lack of standing and failure to state a claim upon which relief can be granted. The Kansas Supreme Court denied review.

II. The Brady Act

The Brady Act, Public Law 103-159, codified at 18 U.S.C. § 922(s), amended the Federal Gun Control Act of 1968 and took effect on or about February 28, 1994. With this statute, the United States Congress purports to conscript State subdivision law enforcement officials to administer a federal program regulating the transfer of handguns from Federal Firearms Licensees (transferors) to purchasers (transferees).

Presently, the defendant "Chief Law Enforcement Officer" (CLEO), under impressment of this federal statute, conducted a background check and exercised discretionary control over the length of a waiting period against the plaintiff handgun transferee, and this forward restraint against the delivery of the firearm occupied seven days.

III. Plaintiff's Claim of Unconstitutionality

Thus this claim concerns 18 U.S.C. § 922(s), the defendant's enforcement of which contravenes the United States Constitution Amendments Nine and Ten, and the Kansas Constitution Bill of Rights § 20, as they inform interpretation of the powers delegated to Congress in Article 1, § 8 of the United States Constitution, thereby trespassing the plaintiff's fundamental right to keep and bear arms by application of a prior restraint thereagainst, all as defective to jurisdiction of the law.

IV. Proceedings in the Kansas Courts

Petitioner *pro se* notice-pled trespass against his sovereignty as secured by the Ninth and Tenth Amend-

ments to the United States Constitution and analogous provisions of the Kansas Constitution Bill of Rights.

All the federal questions sought to be reviewed here were raised in the original October 7, 1994, Petition to the District Court.

Defendant's Motion to Dismiss under K.S.A. 60-212 for failure to state a claim upon which relief can be granted and because plaintiff lacks "standing" to make a Ninth and Tenth Amendments claim was filed November 10, 1994, along with a Notice of Hearing set for December 5, 1994.

Plaintiff opposed the Motion and pursued the federal questions in a Suggestion in Opposition filed November 18, 1994.

Under Kansas law, the defendant's motion admits the allegations enumerated in the Petition as *infra*:

> Plaintiff is a citizen of the state of Kansas under the constitutions and laws of the state of Kansas and the republic of the United States of America. (Petition ¶ 1.)
>
> The City of Overland Park is a political subdivision of the state of Kansas and is the Plaintiff's "place of residence" for purposes of Section 102(a) of Public Law 103-159, 107 Statute 1536 (1993), codified at 18 U.S.C. § 922(s). (Petition ¶ 2.)
>
> Defendant Myron Scafe is the duly charged "Chief Law Enforcement Officer" of the City of Overland Park as that position is defined for purposes of Section 102(a) of Public Law 103-159, 107 Statute 1536 (1993), codified at 18 U.S.C. § 922(s). (Petition ¶ 3.)

This Court is appropriately vested with venue pursuant to K.S.A. 60-602(2) because the cause of action arose in Johnson County, Kansas, and the Defendant is the acting public officer. (Petition ¶ 4.)

Plaintiff purchased a handgun legally from a Federal Firearms Licensee, who was prohibited by provisions of 18 U.S.C. § 922(s)(1)(A)(ii)(I), and prohibited by no other law, to deliver said firearm to Plaintiff prior to receiving notice of "no information" from Defendant in pursuance of 18 U.S.C. § 922(s)(1)(A)(ii)(II), or, in lieu of said notice, until a period of "five (5) business days" or seven (7) days should elapse, such as did transpire. (Petition ¶ 5.)

Defendant did irreparable harm by such prior restraint of Plaintiff's fundamental right to keep and bear arms, which is what takes place when a city officer acts *ultra vires* as a federal agent and as without Kansas statutory authority. (Petition ¶ 6.)

By consentual enforcement of 18 U.S.C. § 922(s) defective to jurisdiction, Defendant trespassed the Plaintiff's Constitutional rights to "respective State" and We "the people" sovereignty as informed by Articles Nine and Ten of the Amendments to the United States Constitution and §20 of the Bill of Rights in the Kansas Constitution. (Petition ¶ 7.)

> Plaintiff has no adequate remedy at law to address the actions of Defendant and the resulting injury in fact to Plaintiff's Constitutional rights and sovereignty. (Petition ¶ 8.)
>
> WHEREFORE Plaintiff prays that the Court: Enter a declaratory judgment that 18 U.S.C. § 922(s) *et seq.* is unconstitutional and void as it contravenes the Ninth and Tenth Amendments by exceeding the powers delegated to Congress in Article 1, § 8 of the United States Constitution. (Petition, Prayer ¶ 1.)

The District Court in error failed to "find and state" the "controlling facts" in its Memorandum Opinion and Decision. K.S.A. 60-252(a).

The District Court by "final judgment" concluded that "plaintiff lacks the requisite standing to maintain this action" and sustained the Motion to Dismiss. The Court held only that "I am unable to find that plaintiff has standing sufficient to permit him to challenge the statute on the grounds relating to the Ninth and Tenth Amendments." (Pet. App. 1a, 7a.)

The Court of Appeals passed on the federal questions by *per curiam* Memorandum Opinion affirming the judgment of the District Court while indicating both a lack of standing and failure to state a claim upon which relief can be granted.

> The FFL may transfer the handgun to the purchaser if the CLEO has issued a report that no information was found indicating the transfer would be illegal (a "no information"

> report) or if 5 business days have elapsed since the report was requested and no report has been received by the FFL.
>
> In this case, Niewald purchased a handgun from the FFL. The Department did not issue a report after one was requested by the FFL. After waiting 5 business days, the FFL transferred the handgun to Niewald. Niewald argues that the duties imposed on the CLEO violate the Ninth and Tenth Amendments to the United States Constitution, as well as Section 20 of the Kansas Constitution Bill of Rights, by requiring the State to implement a federal regulatory scheme.

Kansas Court of Appeals Opinion (Pet. App. 9a, 12a).

And relevant oral admissions made by defendant at the December 5, 1994, Hearing include the following:

> When the plaintiff attempted to purchase his handgun, the federal licensee correctly sent the federal form to the Overland Park Police Department, at which time a license check or -- I'm sorry -- a records check was run. That records check basically showed nothing, and it's the position of the Overland Park Police Department that it will not send back a form on each and every one of these, and, thus, to reduce the amount of manpower required...

(Transcript of Proceedings, 5-6; Record, Vol. II, 5-6.)

Additional portions of the record showing when and how appellant pursued the federal questions sought to be reviewed are reprinted here at Pet. App. 30a.

REASONS FOR GRANTING THE PETITION

This Court should review the final decision of the Kansas State courts for at least three important reasons.

First, this Court should grant review because of the importance of the issue raised. Broadly speaking, the grave issue is whether this nation will become a consolidated government absolute in its jurisdiction, with state governments existing only to exercise their powers by its sufferance, or remain a union of states and a nation of people as intended by the founding fathers.

Second, the state court Memorandum Opinion and Decision is a "final judgment" on the merits and therefore determines the rights of the maker of the undertaking as effectually as would an actual trial upon the merits. Thus, "a state court...has decided an important question of federal law that has not been, but should be, settled by this Court[.]" Supreme Court Rule 10(c). Also under this rule, the Kansas court decision conflicts with several of this Court's holdings, especially *United States v. Lopez*, 115 S.Ct. 1624 (1995), and *New York v. United States*, 505 U.S. 144 (1992).

Finally, the federal enactment in question represents a novel intrusion upon the territorial rights and powers vested in the people of "the thirteen united States of America" by our Declaration of Independence in 1776. This Court should grant review because the statute's impressment of State subdivision police agents to administer a federal gun law against a State citizen is precedentially dangerous, offensive to liberty under "our federalism," and unconstitutional.

I. Importance of the Issue

A. United States Jurisdictions

"The term 'United States' may be used in any one of several senses... It may designate the territory over which the sovereignty of the United States extends, or it may be the collective name of the states which are united by and under the Constitution." *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 671-672. The 50 States united by and under the Constitution are not "united with" the District of Columbia; the Union and the seat of government are constitutionally distinct. *Palmore v. United States*, 411 U.S. 389, 395. In this sense there are two different "United States".

1. Territory. The "territory over which the sovereignty of the United States extends" is confined to the "ten Miles square" and does not include the 50 States. U.S. Const. Art. 1, § 8, cl. 17. This "territorial jurisdiction" of the United States comprises the District of Columbia. 18 U.S.C. § 7, ¶ 3. Under our Constitution, each State is sovereign to its own territory.

2. Union. United States jurisdiction under our Union is delegated by subject. Article 1, § 8, cl. 1-16 with 18. The powers are limited to those enumerated. U.S. Const. Am. 10. The "people" never delegated a police power to the Union; evidently the United States is without authority to exercise a "general police power." *United States v. Lopez*, 115 S.Ct. 1624, 1634.

There is no federal general police power for much the same reason that, "There is no federal general common law." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78. There is no territory under the Union.

This means Congress exercises two different types of power--one enumerated, one exclusive--over two separate and distinct jurisdictions. *Palmore*, *id*, 397-398.

Congress has plenary authority (the right "to exercise exclusive legislation," the "police power") pursuant to its territorial delegation at Article 1, § 8, Clause 17. *United States v. Lopez*, *id*, 1644 n.3 (Thomas concurring). The danger to State sovereignty posed by federal police legislation within State territory is clear because "sovereignty is mainly territorial[.]" *Central Railroad Co. v. Jersey City*, 209 U.S. 473, 479.

The people of the States never ceded their territorial sovereignty. "No political dreamer was ever wild enough to think of breaking down the lines which separate the States[.]" *McCulloch v. Maryland*, 17 U.S. 316, 403. "'The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'" *New York v. United States*, 505 U.S. 144, 162.

The Brady Act commandeers the instant Chief of Police, gives him a federal title ("Chief Law Enforcement Officer"), and assigns federal duties pursuant to 18 U.S.C. § 922(s). The defendant's charge under the Act intrudes upon the powers reserved to the States by the Tenth Amendment; police departments "provide an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." *National League of Cities v. Usery*, 426 U.S. 833, 855. Police protection is one of the activities "typical of those performed by state and local governments[.]" *Id*, 851. As here, "the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require." *Id*, 847.

If Congress is permitted to exercise exclusive legislation within Kansas proper, then the "lines which separate the States" have broken down, and those "indestructible States" have become little more than political subdivisions of the seat of government.

This is so because "Exclusive legislative power is in essence complete sovereignty." *S.R.A., Inc. v. State of Minnesota*, 327 U.S. 558, 562. The Union government has no such sovereignty because there is no territory under the Union and none of the power that "goes with the territory." Consequently, 18 U.S.C. § 922(s) is "defective to jurisdiction" of the law as a regulation of police (Petition ¶ 7).

Here the question is essentially a jurisdictional one, and any expansion of federal power is at the expense of the powers reserved to the states by the Tenth Amendment, which is, after all, as much a part of the Bill of Rights as the first. *United States v. Lopez*, 2 F.3d 1342, 1364, *aff'd* 115 S.Ct. 1624.

B. Common Law Jurisdictions

The common law remains in force in the State of Kansas where the constitution is silent or the legislature has failed to act. K.S.A. 77-109. Common law embraces that great body of unwritten law founded upon general custom, usage, or common consent. *Samsel v. Wheeler Transport Services*, 246 Kan. 336, 349.

Arms, including handguns, are clearly within this common law embrace because "the fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Staples v. United States*, 114 S.Ct. 1793, 1799. Guns "generally can be owned in perfect innocence", and "traditionally have been widely accepted as lawful possessions[.]" *Id*, 1800.

1. The States Respectively. The individual states never surrendered their common law. U.S. Const. Am. 10. There is no common law of the United States, as contradistinguished from the individual states. *Erie Railroad, id.* The police power, like the right to our private arms, obtains from common-law governance

vested in the people of the united States before ratification of the United States Constitution, since which "'all is retained which has not been surrendered.'" *New York v. United States*, 505 U.S. 144, 156.

2. The People. The "fundamental" right claimed presently (Petition ¶ 6) is one of "those 'fundamental' rights attached to state citizenship which are peculiarly the creation and concern of state governments...those fundamental rights of person and property attached to citizenship by the common law and enactments of the states." *Hague v. C.I.O.*, 307 U.S. 496, 520-521 n.1.

William Blackstone's *Commentaries* are "the most satisfactory exposition of the common law[.]" *Bloom v. State of Illinois*, 391 U.S. 194, 199. There, arms are called the "last auxiliary right," and common-law "rights and liberties" include "the right of having and using arms for self-preservation and defence." *Blackstone's Commentaries* 1:139, 1:140.

So, Federal privileges and immunities may seem limited in their formulation by comparison with the expansive definition given to the fundamental privileges and immunities attributed to state citizenship. *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842, 1874 (Kennedy concurring). Plaintiff alleged state citizenship (Petition ¶ 1) in order to claim that fundamental character of rights attached to "citizenship by the common law." *Hague, id.*

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.

U.S. Term Limits, Inc. v. Thornton, id, 1872.

> The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other.

United States v. Cruikshank, 92 U.S. 542, 549. The powers which one possesses, the other does not. They are established for different purposes, and have "separate jurisdictions." *Id*, 550. The citizen can demand protection from each "within its own jurisdiction." *Id*, 551.

And the *plaintiff* position is constructive of that jurisdiction; the party who brings a suit is master to decide upon what law he will rely. *Manley v. Park*, 62 Kan. 553, 559, *aff'd* 187 U.S. 547. This claim concerns rights based on State law and Kansas citizenship and so was brought in a Kansas court, because "the judging of questions concerning rights which depend on state law is not normally assigned to federal tribunals." *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842, 1859.

Because 18 U.S.C. § 922(s) contravenes the Ninth and Tenth Amendments, those "questions concerning rights which depend on state law" become "federal questions" of the sort the Supreme Court of the United States was organized to try.

II. Incorrectness of the Kansas Court Decision

A. The Final Decision Rule

The trial court held that, "This MEMORANDUM OPINION AND DECISION shall serve as the final judgment of the Court in this matter..." (Pet. App. 7a.) By rule, the trial court adjudicated the merits of the cause of action. *Honeycutt v. City of Wichita*, 251 Kan. 451, Syl. ¶ 1. And dismissal operates on the merits under K.S.A. 60-241(b). *Wirt v. Esrey*, 233 Kan. 300, 309-310.

B. Standing

The district courts of Kansas have "general original jurisdiction of all matters, both civil and criminal, unless otherwise provided by law[.]" K.S.A. 20-301. No court presently held that it lacked jurisdiction.

> CONSTITUTIONAL LAW - *Standing to Sue.* Standing to sue means that a party has sufficient interest in a justiciable controversy to obtain judicial resolution of that controversy.

Joe Self Chevrolet, Inc. v. Board of Sedgwick County Comm'rs, 247 Kan. 625, Syl. ¶ 1.

Standing is not jurisdictional here because the instant action is not a creature of statute. "[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents." *International Primate Protection League v. Tulane Educational Fund*, 500 U.S. 72, 77. "[S]tanding 'should be seen as a question of substantive law, answerable by reference to the constitutional provisions invoked'". *Id.*

Here, standing arises from the admissions that the plaintiff (Petition ¶ 1) purchased a handgun legally (Petition ¶ 5), and the defendant enforced a seven-day restraint against its delivery pursuant to 18 U.S.C. § 922(s), causing irreparable harm and direct injury in terms of the Ninth and Tenth Amendments (Petition ¶¶ 5, 6, 7, 8), which "provide that certain rights and powers are retained by and reserved to 'the people.'" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265.

In fact, objections to the constitutional validity of statutes can be made only by those to whom the enactment applies and against whom attempts to enforce it are made. *The State v. Smiley*, 65 Kan. 240, Syl. ¶ 1.

C. Failure to State a Claim Upon Which Relief Can be Granted

1. Relief Upon Any Theory. When a defendant files a motion to dismiss for failure to state a claim upon which relief can be granted, the court must accept the allegations in the petition as true, and all inferences favorable to plaintiff will be drawn. *Wirt v. Esrey, id,* 309.

Kansas now requires only a "bare-bones pleading which outlines the nature of the claim." *Oller v. Kincheloe's, Inc.*, 235 Kan. 440, 446. "A petition which alleges a claim for relief upon any theory is sufficient to withstand a motion to dismiss lodged against it." *Oller, id,* 447. "Under the Kansas Code of Civil Procedure, there is no requirement that pleadings state facts sufficient to constitute a cause of action." *Oller, id.*

2. Judicial Review Under Article VI. Under our Constitution, it is the role of the judiciary to "say what the law is." The Court's acknowledged power of judicial review means this claim is one "upon which relief can be granted." *Marbury v. Madison*, 5 U.S. 137. K.S.A. 60-1701 *et seq.* The judge of a state court is "bound equally" under the Supremacy Clause and may not enforce a federal statute the terms of which are unconstitutional. *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 247-248. *Miller v. Municipal Court of City of Los Angeles*, 142 P.2d 297, 303.

The Supremacy Clause also reinforces State sovereignty and the Bill of Rights and thereby supports plaintiff's fundamental right to arms at common law by effectively prohibiting abrogation of state law which facilitates implementation of a protected right, just as it would effectively demand abrogation of a state law which would otherwise prevent enforcement of the right. *Puget Sound Gillnetters Ass'n v. Moos*, 603 P.2d 819, 826.

III. Our Federalism

"The unanimous Declaration of the thirteen united States of America" became the positive legal foundation for our Nation in 1776; the investitive fact of the people's sovereignty is God, "the creator and the sovereign of the universe." *Noah Webster's 1828 American Dictionary of the English Language.*

> [T]he Declaration of Independence recognizes the presence of the Divine in human affairs in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights...'

Holy Trinity Church v. United States, 143 U.S. 457, 467.

> The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator.'

United States v. Cruikshank, 92 U.S. 542, 553.

In 1861 Kansas was admitted into the Union upon an equal footing with the original States, that is, with the same rights of political dominion and sovereignty, subject like them only to the Constitution of the United States. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U.S. 525, 526.

The act admitting Kansas as a State into the Union had the effect to withdraw from federal jurisdiction all the territory within the boundaries of the new State. *Id*, 527. Kansas is not federal territory.

> It will be admitted on all hands, that with the exception of the powers surrendered by the Constitution of the United States, the people of the several States are absolutely and unconditionally sovereign within their respective territories.

Ohio Life Ins. and Trust Co. v. Debolt, 57 U.S. 416, 428.

"We the People" engrafted federal subject matter jurisdiction over our State territorial systems "in Order to form a more perfect Union," not to consolidate that Union into one government absolute in its jurisdiction at the expense of our fundamental common-law rights.

The federal legislation challenged here does not merely intrude upon an area normally associated with traditional State territorial sovereignty; rather "territory" is literally a subject of 18 U.S.C. § 922(s), in much the same way that territory was a subject of the Gun Free School Zones Act declared unconstitutional by this Court in 1995. 18 U.S.C. § 922(q). The Brady Act excepts from the background check and waiting period those individuals residing in "certain geographic areas" to effectively create federal zones within Kansas proper. See 18 U.S.C. § 922(s)(1)(F) at (i),(ii),(iii).

The "invisible federal zone[s]" created by Congress in the Gun Free School Zones Act led to the opinion that, "The tendency of this statute to displace state regulation in areas of traditional state concern is evident from its territorial operation." *United States v. Lopez*, 115 S.Ct. 1624, 1641 (Kennedy concurring). The Brady Act is similarly territorial.

Other special exceptions in the statute's provisions indicate its "municipal" nature and hence its unconstitutionality as federal legislation. 18 U.S.C. § 922(s)(B)-(F).

The pre-constitutional police power of the thirteen original States is reserved to Kansas by the Tenth Amendment; the Constitution "withhold[s] from Congress a plenary police power[.]" *United States v. Lopez*, 115 S.Ct. 1624, 1626.

> As James Madison wrote, '[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'
> ...This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'

United States v. Lopez, 1626. Thus, where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents. *New York v. United States*, 505 U.S. 144, 178. And the instant plaintiff's right to this "direct agency" is not the defendant's to waive:

> The Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'

New York v. United States, 181.

Thus a Kansas official may not "consent" to administer a federal police power, because a departure from the constitutional plan cannot be ratified by the consent of state officials. State officials "cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution." *New York*, 182.

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Federal Government may not compel the States to enact or administer a federal regulatory program. *New York*, 188.

Congress may have had the best intentions in passing the Brady Act, but courts should not bend the Constitution to suit the law of the hour; neither should they fail to look beyond the end result sought to be accomplished by the thing proposed.

This statute is a dangerous contravention of "respective State" and We "the people" sovereignty (Petition ¶ 7), and represents the type of transgression that should be arrested sooner rather than later. Every journey to a forbidden end begins with the first step.

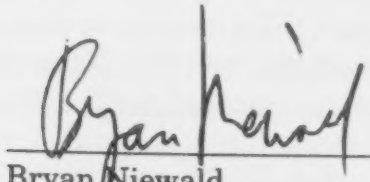
The people of the state of Kansas retain jurisdiction over their territory and over the fundamental rights of person and property that go with the territory. The defendant's enforcement of the statute infringes upon the sovereignty retained by and reserved to the people under the Ninth and Tenth Amendments.

The people of the States never surrendered their common law and never delegated a general police power to the federal government. This enactment is not within the compass of Constitutional authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Bryan Niewald
7116 West 69th Street
Overland Park, Kansas
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pro se

APPENDIX

IN THE DISTRICT COURT OF
JOHNSON COUNTY, KANSAS
CIVIL COURT DIVISION

BRYAN NIEWALD,
Plaintiff,

vs.

Case No. 94C11593
Court No. 17
Chapter 60

MYRON SCAFE, Chief of Police, City of Overland Park, KS Police Dept.,
Defendant.

MEMORANDUM OPINION AND DECISION

This matter is before the Court for decision on defendant's Motion to Dismiss pursuant to K.S.A. 60-212. Defendant argues that plaintiff's Petition should be dismissed for failure to state a claim upon which relief can be granted and that plaintiff lacks standing to make the constitutional claim asserted.

Plaintiff's claim is for a permanent injunction against the enforcement of Public Law 103-159, 18 U.S.C. Sec. 922(s), popularly known as the "Brady Bill", and for a declaratory judgment of unconstitutionality.

The Brady Bill amends the Gun Control Act of 1968, at 18 U.S.C. Sec. 921, *et seq.* Prior to the enactment of the Brady Bill, federal firearms licensees were prohibited from:

> ...transferring firearms or ammunition to any person the licensee knows, or has reasonable cause to believe: is under indictment for, or has been

convicted of a crime punishable by imprisonment for a term exceeding one year; is a fugitive from justice; is an unlawful user of illegal substances; has been adjudicated a mental defective; is an illegal alien; has been dishonorably discharged from the armed forces; or has renounced his or her citizenship. 18 U.S.C. Sec. 922(d)(1)-(7).

Prior to passage of the Brady Bill, federal firearms dealers were required to have customers fill out an ATF form on which the customer certified that he or she was not prohibited by law from receiving or possessing a firearm.

The interim provisions of the Brady Bill alter the customer screening process. The bill requires customers to fill out a different ATF form that provides a statement to include the customer's name, date of birth and address as they appear on a piece of picture identification. 18 U.S.C. sec. 922(s)(3)(A). The customer must also state under oath that he or she is not barred from purchasing or receiving a firearm in interstate or foreign commerce.

The federal firearms dealer must then transmit the contents of the form to the Chief Law Enforcement Officer of the place of residence of the prospective customer within one day of its completion and send a copy of the form to that official. Upon receipt of the form, the Brady Bill requires the Chief Law Enforcement Officer to make a reasonable effort to ascertain within five business days whether receipt or possession of a handgun would be in violation of the law, including research in whatever State and local record keeping systems are available.

The federal licensed dealer is prohibited from transferring the firearm until he or she is advised by the Chief Law Enforcement Officer that the transfer of the

firearm would not be illegal, or until five days have elapsed since the Chief Law Enforcement Officer received the proposed transfer, whichever occurs first. In the event that it is determined that the proposed firearm transfer does not violate the law, the Chief Law Enforcement Officer is required to destroy any records received or generated due to the proposed transfer within twenty days after completion of the application.

A purchaser who is determined ineligible to receive a handgun based on the Chief Law Enforcement Officer's records check may, upon request, obtain a written explanation from the Chief Law Enforcement Officer explaining the reasons for the denial.

The above provisions are all interim provisions of the new law. The Brady Bill provides for the eventual use of a national instant background check system that licensed dealers can contact by telephone or otherwise to determine whether a firearm transfer is prohibited. Sheriff Samuel Frank v. The United States of America, _____Supp._____, (Dist. Vermont) (1994 U.S. Dist. LEXIS 11860, August 2, 1994).

The principal thrust of plaintiff's claim of unconstitutionality is that the Brady Bill amounts to an unfunded federal mandate. Plaintiff argues that in assuming the responsibility for conducting a records check, defendant Scafe did so "pursuant to a federal law which commandeered him to do so UNCONSTITUTIONALLY." Plaintiff further argues that "Law enforcement functions previously carried out by the Chief of Police have necessarily been eliminated or scaled back in order to redirect manpower to the conducting of background checks on prospective handgun purchasers in order to satisfy the 'requirements' of this federal law, even though refraining from such enforcement invokes no sanction or penalty for the Chief of Police." Finally,

plaintiff argues that "Given that the federal 'mandate' in 18 U.S.C. Section 922(s) is unfunded, the economic burden imposed by the background checks (which the Chief of Police has consented to conduct) falls on Kansans whose State legislature never passed such a statute." From this argument, plaintiff concludes that "Defendant [Scafe] trespassed the Plaintiff's constitutional rights to 'respective State' and We 'the people' sovereignty as informed by Articles Nine and Ten of the Amendments to the United States Constitution and Section 20 of the Bill of Rights in the Kansas Constitution."

The Ninth and Tenth Amendments to the U.S. Constitution are as follows:

> "Amendment 9.--Effect of Enumeration of Rights. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
>
> "Amendment 10.--Reservation of Powers to States. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 20 of the Kansas Bill of Rights is as follows:

> "Section 20. Powers retained by the people. This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people."

Defendant's Motion to Dismiss is premised upon

the claims that (1) plaintiff fails to state a claim upon which relief can be granted; and (2) that plaintiff lacks standing.

The question of "standing" is a rule of practice developed in the federal courts.

> "Generally a person has standing in the federal courts to raise constitutional issues only when his own rights are affected." 2 Modern Constitutional Law, Chester J. Antieu (1969), Sec. 15.23, p. 659.

> "To have standing to raise constitutional issues in the federal courts, not only must the plaintiff be asserting his own, personal right, but the right must be a legal right. Where a utility had no legal right to be free from competition, it could not have standing in the federal courts to complain of competition from municipal utilities under Congressional encouragement. 'Where, although there is damage, there is no violation of a right,' said the Supreme Court, 'no action can be maintained.'" [citing from Alabama Power Co. v. Ickes, 302 U.S. 464, 82 L.Ed. 374, 58 S. Ct. 300 (1938)].

> "Not only must there be a legal right, but it must be substantial and not a mere remote, indirect interest. The Supreme Court has ruled that a party who seeks to have a federal court declare legislation unconstitutional 'must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers

> in some indefinite way in common with people generally.'" [citing Frothingham v. Mellon, 262 U.S. 447, 67 L.Ed. 1078, 43 S. Ct. 597 (1923)]. Antieu, *op. cit.*, Sec. 15.23, p. 662.

Applying these principals to the case at bar, the Court is compelled to find that plaintiff lacks standing to make the constitutional challenge on the grounds asserted.

To the extent that plaintiff's "fundamental right to keep and bear arms" is the specific injury, it does not directly relate to the constitutional infirmities challenged. And, on the other hand, when plaintiff argues that "Law enforcement functions previously carried out by the Chief of Police [defendant Scafe] have necessarily been eliminated or scaled back in order to redirect manpower to the conducting of background checks on prospective handgun purchasers in order to satisfy the 'requirements' of this federal law, even though refraining from such enforcement invokes no sanction or penalty for the Chief of Police," he is arguing injury which "he suffers in some indefinite way in common with people generally."

See, also, O'Shea v. Littleton, 414 U.S. 488, 38 L.Ed.2d 674, 94 S.Ct. 669 (1979) where the U.S. Supreme Court held:

> "Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction' [citations omitted]. There must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' [citations

> omitted]. Nor is the principle different where statutory issues are raised. [citations omitted]. Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. [citations omitted]."

Even when viewed in the light most favorable to plaintiff, and with every doubt resolved in plaintiff's favor (Knight v. Neodesha Police Dept., 5 Kan.App. 2d 472, 620 P.2d 837 (1980), I am unable to find that plaintiff has standing sufficient to permit him to challenge the statute on the grounds relating to the Ninth and Tenth Amendments. At best, any injury suffered by plaintiff is entirely abstract. Accordingly, I conclude that plaintiff lacks the requisite standing to maintain this action, and the Motion to Dismiss of the defendant should be sustained.

It is, therefore, by the Court, ORDERED, that plaintiff's Petition be, and the same hereby is, dismissed.

This MEMORANDUM OPINION AND DECISION shall serve as the final judgment of the Court in this matter and shall be effective upon its filing with the Clerk of the Court.

s/ William O. Isenhour, Jr.
WILLIAM O. ISENHOUR, JR.
DISTRICT JUDGE

CERTIFICATE OF MAILING

Copy of the above and foregoing Memorandum Opinion and Decision was filed with the Clerk and mailed, first class postage prepaid, to Bryan Niewald, 7116 West 69th Street, Overland Park, KS 66204,

plaintiff, pro se, and to Michael R. Santos, Senior Assistant City Attorney, 8500 Antioch, Overland Park, KS 66212, attorney for defendant, this 5th day of January, 1995.

s/ Verna D. Clark
Verna D. Clark
Administrative Assistant

CLERK OF DISTRICT COURT
JOHNSON COUNTY, KS.

'95 JAN -5 P2:10

NOT DESIGNATED FOR PUBLICATION

No. 73, 337

IN THE COURT OF APPEALS OF
THE STATE OF KANSAS

BRYAN NIEWALD,
Appellant,

v.

MYRON SCAFE, Overland Park Chief of Police,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; WILLIAM O. ISENHOUR, JR., judge. Opinion filed December 1, 1995. Affirmed.

Bryan Niewald, appellant pro se.

Michael R. Santos, senior assistant city attorney, and *Robert J. Watson*, city attorney, of Overland Park, and *Michael Schultz*, of Fort Collins, Colorado, for the appellee.

Before LEWIS, P.J., PIERRON, J., and RICHARD W. WAHL, District Judge Retired, assigned.

Per Curiam: Bryan Niewald purchased a handgun from a licensed federal firearms dealer (FFL) in Overland Park. Pursuant to 18 U.S.C. § 922(s) (1994), the Brady Act, the FFL asked the Overland Park Police Department (the Department) to run a background check to determine whether Niewald was prohibited from owning the handgun. The Department, pursuant to policy, did not respond to the request because the background check did not indicate that Niewald was prohibited from owning the handgun. After waiting the required 5 days for a response from the Department, the FFL gave Niewald the handgun.

Niewald filed suit against Myron Scafe, as the chief law enforcement officer (CLEO) of the Department, challenging the constitutionality of 18 U.S.C. § 922(s) and the Department's policy of not issuing a response when no information is found regarding a purchaser. Niewald requested declaratory and injunctive relief. The trial court granted Scafe's motion to dismiss under K.S.A. 60-212(b) because Niewald lacked standing to challenge 18 U.S.C. § 922(s) and the Department's policy. Niewald appeals. We affirm.

STANDARD OF REVIEW

When a trial court grants a motion to dismiss under K.S.A. 60-212(b)(6) for failure to state a claim for which relief can be granted, we are required to assume the facts alleged by the plaintiff are true and to make any reasonable inferences to be drawn from those facts. We are then required to determine whether those pleaded facts and inferences state a claim, not just on the theory put forth by the plaintiff, but on any possible theory we can divine. *Noel v. Pizza Hut, Inc.*, 15 Kan. App.2d 225,

231, 805 P.2d 1244, *rev. denied* 248 Kan. 996 (1991). Dismissal is appropriate if there is no theory upon which the plaintiff can recover. The hesitation of appellate courts to affirm K.S.A. 60-212(b) dismissals is based upon the need to conduct discovery and the importance of the pretrial order in determining the issues to be resolved. 15 Kan. App.2d at 231-34. In this case, additional discovery and any issues derived therefrom would not raise a theory under which Niewald could recover.

We are not required to accept conclusory allegations on the legal effects of events if the allegations do not reasonably follow from the description of what happened or if the allegations are contradicted by the description of events. *Bruggeman v. Schimke*, 239 Kan. 245, 247, 718 P.2d 635 (1986).

Turning to the issue of standing, Niewald claims standing is a federal concept that has not been adopted by Kansas and points to the trial court's citation to federal case law. However, Niewald is incorrect. Kansas courts have adopted the practice of dismissing claims under K.S.A. 60-212(b) where a party lacks standing because a lack of standing also means there is no claim upon which the party can be granted relief. See, *e.g.*, *Sebree v. Board of Shawnee County Comm'rs*, 251 Kan. 776, 785, 840 P.2d 1125 (1992); *Blevins v. Board of Douglas County Comm'rs*, 251 Kan. 374, 380-382, 834 P.2d 1344 (1992); *Crow v. Board of Shawnee County Comm'rs*, 243 Kan. 287, 755 P.2d 545 (1988). Niewald must plead facts that demonstrate he has standing to seek the requested relief in order to avoid dismissal under K.S.A. 60-212(b).

Niewald also argues that standing is not required

when a declaratory judgment is sought. We do not agree. Courts of record are authorized to issue declaratory judgments in cases of actual controversy. K.S.A. 60-1701; *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 51, 687 P.2d 622 (1984). A trial court, in its discretion, may decline jurisdiction to issue a declaratory judgment when such judgment would not terminate the uncertainty or controversy. K.S.A. 60-1708. In addition, the plaintiff must have standing in order to seek a declaratory judgment. See *Sebree*, 251 Kan. at 785 (standing required in action for quiet title).

FAILURE TO STATE A CLAIM

Under 18 U.S.C. § 922(s), an FFL is required to request a background report from the CLEO before delivering a handgun to a purchaser. The CLEO is required to make a reasonable effort to determine whether the purchaser may legally own the handgun. The FFL may transfer the handgun to the purchaser if the CLEO has issued a report that no information was found indicating the transfer would be illegal (a "no information" report) or if 5 business days have elapsed since the report was requested and no report has been received by the FFL.

In this case, Niewald purchased a handgun from the FFL. The Department did not issue a report after one was requested by the FFL. After waiting 5 business days, the FFL transferred the handgun to Niewald. Niewald argues that the duties imposed on the CLEO violate the Ninth and Tenth Amendments to the United States Constitution, as well as Section 20 of the Kansas Constitution Bill of Rights, by requiring the State to implement a federal regulatory scheme.

First, Niewald argues that he has standing to raise this claim because his Second Amendment right to keep and bear arms was infringed upon when he was required to wait 5 business days before receiving the handgun. In the alternative, Niewald argues he has standing because the resources of the Department have been redirected to comply with the federal mandate that the Department conduct background checks. As a citizen of Overland Park, Niewald claims he has suffered harm by this redirection of resources.

Kansas has rejected Niewald's second basis for claiming he has standing. Absent a specific statutory grant of standing, evidence of a fraudulent expenditure or an illegal levy, or a claim of injury different from that suffered by other members of the general public, a plaintiff has no standing to challenge an expenditure of public funds. *Crow*, 243 Kan. at 290 (challenge to county expenditures). None of the circumstances which would confer standing on Niewald to challenge the redirection of the CLEO's and the Department's efforts are present. Thus, the trial court properly determined that Niewald lacked standing on this basis.

Regarding Niewald's Second Amendment claim of harm and his request for a declaratory judgment that 18 U.S.C. § 922(s) is unconstitutional, the trial court acted within its discretion under K.S.A. 60-1708 when it declined to issue a declaratory judgment. Niewald did not join the FFL or the federal government as parties. Thus, any judgment would not be binding on them. K.S.A. 60-1712. Therefore, the FFL would still be required to comply with the provisions of 18 U.S.C. § 922(s), and Niewald still would have to wait until 5 business days elapsed before obtaining possession of the

handgun. Because a declaratory judgment would not resolve the controversy or provide Niewald with any relief, the trial court acted within its discretion when it declined to issue one. Although the trial court stated that Niewald lacked standing to ask for declaratory relief, we believe Niewald has failed to request relief that would resolve the controversy, regardless of whether he has standing to request such relief.

Regarding Niewald's request for injunctive relief, the well-pled facts of Niewald's petition, together with any reasonable inferences to be drawn from the facts, do not support a claim for injunctive relief. To obtain injunctive relief from a prospective injury, the movant must show: (1) there is a reasonable probability of irreparable future injury to the movant; (2) an action at law will not provide an adequate remedy; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest. *Sampel v. Balberni*, 20 Kan. App. 2d 527, Syl. ¶ 3, 889 P.2d 804 (1995).

Turning to the first requirement to seek injunctive relief, Niewald does not allege that he plans to make future purchases of handguns or state any facts indicating an instant background check policy would avoid redirection of the Department's resources. Niewald lacks standing to seek injunctive relief because he does not state a claim of any probable future harm that can be avoided through the requested relief.

Regarding the other requirements for seeking injunctive relief, Niewald's petition does not allege that a remedy at law is unavailable. In fact, Niewald may be

able to obtain declaratory judgment and injunctive relief against more appropriate parties--the FFL or the federal government. In addition, Niewald does not allege any facts indicating the CLEO could comply with an injunction requiring instant return of "no information" reports. The cost to the CLEO to comply with an injunction may very well exceed the harm caused by making Niewald and other similarly situated purchasers wait 5 business days before receiving their handguns. Finally, Niewald alleges no facts tending to show that an instant, and in all likelihood less thorough, background check would not be adverse to the public interest. Niewald's petition does not meet any of the four requirements for seeking injunctive relief.

Because Niewald fails to present a claim for either declaratory or injunctive relief, based on the facts stated in the petition and the reasonable inferences drawn therefrom, the trial court appropriately granted the motion to dismiss under K.S.A. 60-212(b). Although our reasoning is not identical to that of the trial court, we affirm when the ruling of the trial court is correct for any reason. *D-1 Constructors, Ltd. v. U.S.D. No. 229*, 14 Kan. App. 2d 245, 246, 788 P.2d 289, *rev. denied* 246 Kan. 766 (1990).

Affirmed.

SUPREME COURT ORDER
DISTRICT CASE NO. 94C11593

IN THE SUPREME COURT
OF THE STATE OF KANSAS

BRYAN NIEWALD
7116 W 69TH ST
OVERLAND PARK KS 66204

PRO SE

BRYAN NIEWALD, APPELLANT,
V
MYRON SCAFE, CHIEF OF POLICE,
CITY OF OVERLAND PARK, KANSAS
POLICE DEPARTMENT, APPELLEE.

NO. 95-73337-AS

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY APPELLANT,
BRYAN NIEWALD.
CONSIDERED BY THE COURT AND DENIED.
RESPONSES NOTED.

DATE: 02/07/96.

CAROL G. GREEN
CLERK

COURT OF APPEALS ORDER
DISTRICT CASE NO. 94C11593

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

BRYAN NIEWALD PRO SE
8991 W. 75TH STREET
OVERLAND PARK KS 66204

BRYAN NIEWALD, APPELLANT,
V NO. 95-73337-A
MYRON SCAFE, CHIEF OF POLICE,
CITY OF OVERLAND PARK, KANSAS
POLICE DEPARTMENT, APPELLEE.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

CITATIONS OF ADDITIONAL AUTHORITY.
NOTED.

DATE: 06/01/95.

CAROL G. GREEN
CLERK

COURT OF APPEALS ORDER
DISTRICT CASE NO. 94C11593

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

BRYAN NIEWALD PRO SE
8991 W. 75TH STREET
OVERLAND PARK KS 66204

BRYAN NIEWALD, APPELLANT,
V NO. 95-73337-A
MYRON SCAFE, CHIEF OF POLICE,
CITY OF OVERLAND PARK, KANSAS
POLICE DEPARTMENT, APPELLEE.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

CITATIONS OF ADDITIONAL AUTHORITY FROM THE APPELLEE.
DENIED.

DATE: 06/15/95.

CAROL G. GREEN
CLERK

COURT OF APPEALS ORDER
DISTRICT CASE NO. 94C11593

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

BRYAN NIEWALD PRO SE
8991 W. 75TH STREET
OVERLAND PARK KS 66204

BRYAN NIEWALD, APPELLANT,
V NO. 95-73337-A
MYRON SCAFE, CHIEF OF POLICE,
CITY OF OVERLAND PARK, KANSAS
POLICE DEPARTMENT, APPELLEE.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

CITATIONS OF ADDITIONAL AUTHORITY BY BRYAN NIEWALD.
NOTED.

DATE: 06/22/95.

CAROL G. GREEN
CLERK

COURT OF APPEALS ORDER
DISTRICT CASE NO. 94C11593

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

BRYAN NIEWALD
8991 W. 75TH STREET
OVERLAND PARK KS 66204

PRO SE

BRYAN NIEWALD, APPELLANT,
V
MYRON SCAFE, CHIEF OF POLICE,
CITY OF OVERLAND PARK, KANSAS
POLICE DEPARTMENT, APPELLEE.

NO. 95-73337-A

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PLAINTIFF, BRIAN NIEWALD'S LETTER TO ADVISE THE COURT OF, AND SET FORTH, RELEVANT AUTHORITIES NOT PREVIOUSLY CITED.
NOTED.

DATE: 08/10/95.

CAROL G. GREEN
CLERK

COURT OF APPEALS ORDER
DISTRICT CASE NO. 94C11593

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

BRYAN NIEWALD PRO SE
8991 W. 75TH STREET
OVERLAND PARK KS 66204

BRYAN NIEWALD, APPELLANT,
V NO. 95-73337-A
MYRON SCAFE, CHIEF OF POLICE,
CITY OF OVERLAND PARK, KANSAS
POLICE DEPARTMENT, APPELLEE.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

RESPONSE FROM MYRON SCAFE TO BRYAN NIEWALD'S 6.09B LETTER.
NOTED AND DENIED.

DATE: 08/25/95.

CAROL G. GREEN
CLERK

COURT OF APPEALS ORDER
DISTRICT CASE NO. 94C11593

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

BRYAN NIEWALD PRO SE
8991 W. 75TH STREET
OVERLAND PARK KS 66204

BRYAN NIEWALD, APPELLANT,
V NO. 95-73337-A
MYRON SCAFE, CHIEF OF POLICE,
CITY OF OVERLAND PARK, KANSAS
POLICE DEPARTMENT, APPELLEE.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

BRYAN NEIWALD'S REPLY TO RESPONSE FROM MYRON SCAFE.
NOTED.

DATE: 08/25/95.

CAROL G. GREEN
CLERK

STATUTORY PROVISIONS

18 U.S.C. § 922

(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun (other than the return of a handgun to the person from whom it was received) to an individual who is not licensed under section 923, unless--

(A) after the most recent proposal of such transfer by the transferee--

(i) the transferor has--

(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);
(II) verified the identity of the transferee by examining the identification document presented;
(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and
(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of

the transferee; and

(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the tranferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that--

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

(E) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(F) on application of the transferor, the Secretary has certified that compliance with subparagraph (A)(i)(III) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only--

(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee--

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year;

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

(v) is not an alien who is illegally or unlawfully in the United States;

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to--

(A) the chief law enforcement officer of the place of

business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law--

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

(8) For purposes of this subsection, the term "chief law enforcement officer" means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

(9) The Secretary shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.

RULE 14.1(g)(i) MATERIAL

PLAINTIFF'S SUGGESTION IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS (FILED NOVEMBER 18, 1994, IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS)

"In any event, it is manifestly the CLEO who exercises control over the length of time of the waiting period for this reason: the FFL can't release the handgun for five days unless, *inter alia*, the defendant sends notice of 'no information.' Defendant failed to send notice, and thus exercised an administrative 'prior restraint' of the plaintiff's fundamental right to keep and bear arms (Petition point 6), which right is secured at common law and by the U.S. and Kansas constitutions." (Suggestion, 3; Record, Vol. I, p. 16.)

"Amendment Ten says:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

And the Kansas Bill of Rights Section 20...says:

> This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people."

(Suggestion, 4; Record, Vol. I, 17.)

"[W]hat the instant defendant did, he did pursuant to a federal law which commandeered him to do so UNCONSTITUTIONALLY...The result was the 'injury in fact': a prior restraint of my fundamental right to keep and bear arms." (Suggestion, 5; Record, Vol. I, 18.)

"The zone of interest in the instant action is my proper person and the aforesaid trespass against the constitutional rights deposited by God therein." (Suggestion, 6; Record, Vol. I, 19.)

"[T]he instant action...names a specific plaintiff (one Bryan Niewald) and specific injuries: a prior restraint (trespass) of my fundamental right to keep and bear arms and the consequent contravention of the Tenth Amendment protection of plaintiff's (We) 'the people' and 'respective State' sovereignty as it informs interpretation of the Powers of Congress[.]" (Suggestion, 6; Record, Vol. I, 19.)

"Defendant's jurisdictionally defective conduct is violative of the Kansas Bill of Rights Section 20, as this law is violative of the Tenth Amendment." (Suggestion, 9; Record, Vol. I, 22.)

"Article Nine of the Amendments says:

> The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.

...By the Ninth Amendment the people retain even those rights <u>not</u> written into the Constitution, and by the Tenth Amendment lawful government is comprised of <u>only</u> the written delegations." (Suggestion, 9; Record, Vol. I, 22.)

"Hence the law in question is unconstitutional[.]"

"WHEREFORE plaintiff requests the Honorable Court to deny defendant's motion to dismiss and to direct the defendant to ANSWER pursuant to K.S.A. 60-207(a)." (Suggestion, 11; Record, Vol. I, 24.)

TRANSCRIPT OF PROCEEDINGS (HEARING HELD DECEMBER 5, 1994, IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS)

"I have filed for declaratory and injunctive relief agaist the defendant's enforcement of 18 U.S.C. 922(s), which is a federal law that purports to direct county sheriffs and chiefs of police of larger cities to enforce certain of its provisions, thereby exceeding Congress' authority under Article 1, Section 8, of the United States Constitution.

These sheriffs and chiefs of police are assigned a new federal title which is 'Chief Law Enforcement Officer,' and they are given federal direction pursuant to that federal title. Specifically, the state subdivision law enforcement officials are directed to conduct background checks on prospective handgun purchasers, and, should the prospective purchaser in question be found ineligible to purchase the handgun, to so notify the Federal Firearms seller.

The petitioner suffered irreparable harm by this enforcement, because it is unconstitutional for the federal government to commandeer services of a state or state subdivision official or for that official to consent to the same. The defendant, by actually enforcing this law against the plaintiff, has violated my Tenth Amendment right to the sovereignty of my State of Kansas, whereof I am a citizen.

In the process, some other rights were violated as well, particularly my fundamental right to keep and bear arms. This is a distinct and palpable personal injury, and it is fairly traceable to the defendant's unlawful conduct, and this injury can be redressed by the requested relief of the Court." (Transcript, 11-12; Record, Vol. II, 11-12.)

"Specifically, the only way that the defendant could have kept from exercising an unconstitutional prior restraint, which was a trespass of the plaintiff's fundamental rights, was to have returned notice of 'no information' to the licensee. An injunctive relief preservative of those rights was available by the Court's power. To wit, the Court may declare 18 U.S.C. 922(s) unconstitutional and void in toto and enter a matching order and/or the defendant can be enjoined to conduct a prima facie record check of the Form 5300-35 as transmitted from the FFL to the CLEO, chief law enforcement officer. Immediately thereupon, the CLEO is to adjudge the 5300-35 as eligible or not, and, if eligible, to return notice of 'no information' based on that record check." (Transcript, 14; Record, Vol. II, 14.)

"Again, the Kansas Legislature never passed any of this. There's no funding provided by the federal government. He is essentially doing it for free, and I am very curious as to just what it is that is not being done instead of this. I mean the Chief of Police of Overland Park, Kansas, presumably has their own set of priorities, and they call law enforcement functions essential services for a reason. It is very important. If we arrange priorities a certain way, those are by definition prearranged, altered. The priorities are altered by this enforcement of a federal law which we in Kansas haven't passed." (Transcript, 22-23; Record, Vol. II, 22-23.)

"[I]t's unconstitutional for the federal government to use a state official in this way." (Transcript, 27; Record, Vol. II, 27.)

BRIEF OF APPELLANT
(FILED FEBRUARY 23, 1995, IN THE COURT OF APPEALS OF THE STATE OF KANSAS)

"THE TRIAL COURT IN ERROR STATES THAT 'THE COURT IS COMPELLED TO FIND THAT PLAINTIFF LACKS STANDING TO MAKE THE CONSTITUTIONAL CHALLENGE ON THE GROUNDS ASSERTED,' BY HOLDING THAT, 'TO THE EXTENT THAT PLAINTIFF'S "FUNDAMENTAL RIGHT TO KEEP AND BEAR ARMS" IS THE SPECIFIC INJURY (sic) IT DOES NOT DIRECTLY RELATE TO THE CONSTITUTIONAL INFIRMITIES CHALLENGED.'

The judgment of the District Court holds that '...plaintiff's "fundamental right to keep and bear arms"...does not directly relate to the constitutional infirmities challenged.' Thus that court was 'unable to find that plaintiff has standing sufficient to permit him to challenge the statute on the grounds relating to the Ninth and Tenth Amendments.' Thereby, judgement of the District Court effectively holds that the powers of Congress are unlimited against the plaintiff--that the letter of law in Article I, § 8 of the U.S. Constitution affords plaintiff no theory of relief--and that plaintiff has no standing to claim it does, even in conjunction with other fundamental rights held at common law." (Brief of Appellant, 15.)

"The central issue here is sovereignty, i.e. the delineation of powers between the federal government, the States respectively, and the people. This case is about the defendant's violation of the Kansas Bill of Rights § 20 by his enforcement of a federal law, which law contravenes the Ninth and Tenth Amendments as they inform interpretation of Article 1, Section 8 of the

United States Constitution.

The Declaration of Independence lays the positive legal foundation of our Nation. God is therein explicit to American jurisprudence as the source of our unalienable rights and is recognized by term of art as our "Creator" and "the Supreme Judge of the world" in the Statute of 1776 (K.S.A. Constitutions Volume, p. 159, 160). Therefore, Constitutional rights are not granted by government to the people, but are instead simply guarantees of the common rights already granted by our Creator to render an American citizen's Godful sovereignty a conclusive presumption, instantly *vis* the Kansas Bill of Rights Section 20 and its analogue in the Ninth and Tenth Amendments to the United States Constitution." (Brief of Appellant, 18.)

"Aforesaid God is thus the ultimate 'Sovereign of the universe,' which informs construction of His grant of sovereignty to the people and the people's grant by constitutional delegation. All else the people retain as unalienable rights endowed by the Creator." (Brief of Appellant, 19.)

"The original 'Constitution of 1787' and subsequent 'Bill of Rights' comprise the United States Constitution ratified in 1791 (K.S.A. Constitutions Volume, p. 163), which ordained and established those rights, as in a <u>will</u> by the Founding Fathers to the 'Posterity' (*id*, Preamble p. 164). Because I am one of 'We the People' in whom said rights deposit (Plaintiff's Petition ¶ 1), I am an individual heir to the protections of Right and Liberty published therein, my sovereignty thus limited only by the common law, my own autonomy, and the relevant constitutional delegations." (Brief of Appellant, 20.)

"I claim my right to keep arms because neither the United States Constitution nor the Kansas Constitution confers power to restrict that right to keep arms, while the rules of construction formulated in Amendments Nine and Ten and in Section 20 of the Kansas Bill of Rights enforce my right to keep arms as a reserved power." (Brief of Appellant, 23.)

"The statute [18 U.S.C. § 922(s)] has trespassed jurisdiction of the law at the Ninth and Tenth Amendments, and the defendant has trespassed § 20 of the Kansas Constitution (and the Ninth and Tenth Amendments) by enforcing it." (Brief of Appellant, 24.)

"Section 20 of the Bill of Rights in the Kansas Constitution and Articles Nine and Ten of the Amendments to the United States Constitution reiterate that those constitutions comprise the only measures of sovereignty delivered from the people of Kansas to their governments." (Brief of Appellant, 25.)

"[T]he Kansas legislature has not enacted by bill or otherwise Public Law 103-159, 107 Statute 1536 (1993), or any facsimile thereof...Note that § 922(s)(1)(F) at (i), (ii), (iii) excepts from the waiting period and background check those individuals residing in certain geographic areas..." (Brief of Appellant, 27.)

"...§ 922(s) is thus jurisdictionally defective in the several States." (Brief of Appellant, 28.)

"Again, the record on appeal includes no codicil or other lawfully appropriate document amending, or purporting to amend, those God-given rights guaranteed by our Nation's charter documents and prototyped by the

Framers at fundamental American law: The Declaration of Independence, the United States Constitution, and the Kansas Constitution." (Brief of Appellant, 28.)

"And § 922(s) exceeds the powers of Congress here because it exceeds the jurisdictional ambit of the 'Exclusive legislation' clause to which the statute's form answers, which is retrogressive to the Bill of Rights and a de facto interdiction of the constitutional intendement of law." (Brief of Appellant, 44.)

"WHEREFORE plaintiff requests that the Court of Appeals of the State of Kansas overrule the Honorable District Court and declare 18 U.S.C. § 922(s) to be unconstitutional and void, and enjoin enforcement thereof by defendant and all effecting parties." (Brief of Appellant, 50.)

REPLY BRIEF OF APPELLANT (FILED MARCH 31, 1995, IN THE COURT OF APPEALS OF THE STATE OF KANSAS)

"The defendant makes the following contention on page nine of his brief: 'Clearly a decision in this case on the constitutionality of the Brady Bill will not be binding upon the federal government and any action that it might take against the Chief for violating the law.' The defendant offers no support for this statement.

Actually, the decision of the present Court - in which Court the United States Constitution emplaces concurrent jurisdiction to enforce the federal constitution - will be binding on any Federal Firearms Licensee who conducts business within the territorial jurisdiction of the state of Kansas." (Reply Brief, 8.)

LETTER OF ADDITIONAL AUTHORITY (FILED MAY 17, 1995, IN THE COURT OF APPEALS OF THE STATE OF KANSAS - NOTED BY ORDER REPRINTED HERE AT PET. APP. 17a)

"The following citations are intended to further demonstrate that The United States Constitution divides authority between federal and state governments for the protection of individuals; that the police power is reserved to the States respectively; that Article I, Section 8, Clause 17 of the Constitution defines the territorial jurisdiction within which Congress may exercise exclusive legislation; that Kansas is not such a place, yet 18 U.S.C. § 922(s) is such a law; and that consequently the statute is unconstitutional and this Court should so rule." (5/17/95 Letter, 2.)

LETTER OF ADDITIONAL AUTHORITY (FILED JUNE 7, 1995, IN THE COURT OF APPEALS OF THE STATE OF KANSAS - NOTED BY ORDER REPRINTED HERE AT PET. APP. 19a)

"The following citations are intended to further demonstrate that The United States Constitution divides authority between federal and state governments for the protection of individuals; that the defendant Chief's enforcement of 18 U.S.C. 922(s) against plaintiff is actionable as trespass under the Tenth Amendment because when such constitutional protection is contravened to injury, valid cause of action is established (Brief, 24); that the Tenth Amendment nullifies this infringement by reserving the police power to the several States; and that Common Law and §20 of the Kansas Constitution Bill of Rights then bar the defendant's

enforcement by creating and confirming 'the critical postulate that sovereignty is vested in the people...'" (6/7/95 Letter, 2.)

LETTER OF ADDITIONAL AUTHORITY (FILED JULY 20, 1995, IN THE COURT OF APPEALS OF THE STATE OF KANSAS - NOTED BY ORDER REPRINTED HERE AT PET. APP. 20a)

"The following citations are intended to further demonstrate the fundamental character of rights vested in the people of the state of Kansas (Brief, 3) within the territorial jurisdiction of the state of Kansas (Brief, 27), the authority of a Kansas Court to determine and enforce those rights (Reply Brief, 8), and so the endorsement by the Federal Constitution as to propriety of Kansas process to try conduct of the defendant and validity of the federal statute and adjudge whether they rest on ground conferred by our constitutions." (7/20/95 Letter, 1.)

PETITION FOR REVIEW (FILED DECEMBER 21, 1995, IN THE SUPREME COURT OF THE STATE OF KANSAS)

"Plaintiff prays for judgment declaring 18 U.S.C. § 922(s) unconstitutional and for judgment in mandamus compelling the defendant to abide the Ninth and Tenth Amendments to the United States Constitution and § 20 of the Kansas Constitution Bill of Rights by enjoining his enforcement of 18 U.S.C. § 922(s).

Therefrom plaintiff requests the Court to issue a general prohibitory injunction as to any and all other constituents of this State who may effect provisions of

the ousted section." (Petition for Review, 1.)

"The District Court was 'unable to find that plaintiff has standing sufficient to permit him to challenge the statute on the grounds relating to the Ninth and Tenth Amendments.' ...I've claimed for the court to declare and relieve the defendant's trespass against my 'fundamental right' to arms, a right prototyped at charter law and retained by and reserved to the people *per* the rules of construction in the Ninth and Tenth Amendments and § 20 of the Kansas Constitution Bill of Rights; and that by law our Creator ramparts this pre-constitutional right, won by the people of the united States in the War of Independence and never surrendered." (Petition for Review, 3.)

REPLY OF PETITIONER
(FILED JANUARY 23, 1996, IN THE
SUPREME COURT OF THE STATE OF KANSAS)

"Presently, we see not only the operation of a federal police power within a State as against a citizen of that State, but federal conscription of State law enforcement officials to exercise the statute's provisions against that citizen.

...My fundamental (common-law) right to keep and bear arms is secured, as against 18 U.S.C. § 922(s) and the defendant's enforcement thereof, by the Ninth and Tenth Amendments of the United States Constitution and § 20 of the Kansas Constitution Bill of Rights, as one of 'those fundamental privileges and immunities inherent in *state* citizenship[.]" *Prudential Ins. Co. of America v. Cheek*, 259 U.S. 530, 539 (emphasis supplied)." (Reply, 9.)